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No. 90-1749

In The

Supreme Court of the United States

October Term, 1990

TRAILER MARINE TRANSPORT CORPORATION,

Petitioner,

v.

ZAPATA GULF MARINE CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is a motion for discretionary prejudgment interest under Section 4 of the Clayton Act a motion for prejudgment interest within the meaning given that term by the Court in *Osterneck v. Ernst & Whinney*, 489 U.S. 109 (1989)?

2. Does a motion for discretionary prejudgment interest filed within 10 days after the entry of judgment constitute a Rule 59 motion to alter or amend the judgment so as to render ineffective any notice of appeal filed before a ruling on that motion?

LIST OF PARTIES, PARENTS AND SUBSIDIARIES

The parties to the proceedings below were Petitioner Trailer Marine Transport Corporation and Respondent Zapata Gulf Marine Corporation.

The shares of Zapata Gulf Marine Corporation are owned by the following entities: B C Partners L.P.; Zapata Corporation; Corporate Partners, L.P.; Corporate Offshore Partners, L.P.; and the State Board of Administrators of Florida. Zapata Gulf Marine Corporation owns a 70% interest in Marine Transportation Services Sea-Barge Group, Inc.

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The Petition presents no ground specified in Rule 10 of this Court. The question of law involved in this case has been definitively decided by the Court, the ruling sought to be reviewed is consistent with that decision, and the purported conflict among the Circuits is illusory. Accordingly, Respondent Zapata Gulf Marine Corporation respectfully requests that the Court deny the Petition for Writ of Certiorari to Review the Decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

Jurisdictionally relevant Opinions and Orders are found in the Appendices to the Petition for Writ of Certiorari. The Opinion of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's appeal is reported at 925 F.2d 812 and reproduced in Appendix A to the Petition. The unreported Order of the court of appeals denying the Petition for Rehearing and the Suggestion for Rehearing *En Banc* was entered April 2, 1991 and is reproduced in Appendix B to the Petition.

JURISDICTION

1. The Fifth Circuit's decision that it had no jurisdiction to review Petitioner's appeal was issued on February 25, 1991. A Petition for Rehearing was filed within the allotted time and denied April 2, 1991. The Petition for Writ of Certiorari was filed May 15, 1991.

2. The district court had jurisdiction under 28 U.S.C. § 1337 and 15 U.S.C. § 15(a).

STATUTES AND RULES INVOLVED

The statutes and rules relevant to this case are as follows:

1. Federal Rule of Appellate Procedure 4(a)(4):

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional

findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

2. Federal Rule of Civil Procedure 59(e):

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

3. Clayton Act § 4(a), 15 U.S.C. § 15(a):

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In

determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only –

> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
>
> (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
>
> (3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

COUNTERSTATEMENT OF THE CASE

By decision dated February 25, 1991, the Fifth Circuit dismissed the appeal of Petitioner Trailer Marine Transportation Corporation ("TMT"). The Fifth Circuit held that it lacked jurisdiction because TMT failed to file any notice of appeal following the district court's order denying the motion of Respondent Zapata Gulf Marine Corporation ("Zapata") for an award of prejudgment interest under Section 4 of the Clayton Act. In so doing, the Fifth Circuit followed the unambiguous holding of this Court in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989).

TMT has sought to avoid the rule of *Osterneck* by stating that what Zapata filed was a motion for sanctions. That is not so.[1] Zapata's motion was a motion for prejudgment interest. Section 4 of the Clayton Act is entitled: "Suits by persons injured: (a) Amount of recovery; prejudgment interest." 15 U.S.C. § 15(a). Zapata's motion did not even arguably seek sanctions. TMT's Petition is an attempt to create an artificial conflict between the Fifth Circuit's decision in this case and decisions of other circuit courts dealing with the effect of motions for sanctions. The attempt cannot work because this is a case about the effects of a post-judgment motion for prejudgment interest, a subject which is foreclosed by the rule of *Osterneck*. Thus, TMT's statement of the case is a materially accurate recitation of the sequence of events which occurred below, with the following exceptions: (1) Zapata did not file a motion for sanctions; (2) the Fifth Circuit did not address the effect of a motion for sanctions; and (3) Section 4 of the Clayton Act does not provide for an award of sanctions. Once that is seen, the rest of the Petition is an interesting, but irrelevant, discussion of an issue not before the Court.

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[1] Respondent could have filed, but did not file, a separate motion for sanctions. It filed three separate motions on March 27, 1990: a motion for prejudgment interest, a motion for costs, and a motion for attorney's fees.

REASONS WHY THE PETITION SHOULD BE DENIED

In its 1989 term, this Court framed the only question relevant to this case as follows:

> [W]hether a motion for discretionary prejudgment interest filed after the entry of judgment constitutes a Rule 59 motion to alter or amend the judgment and renders ineffective any notice of appeal filed before a ruling on that motion.

The unanimous answer of the Court was affirmative. *Osterneck v. Ernst & Whinney*, 489 U.S. at 170. In the interests of " 'operational consistency and predictability in the overall application of the [finality requirement] of §1291' ", the Court established a "bright-line rule" that timely-filed motions for prejudgment interest are motions to alter or amend the judgment under Rule 59 of the Federal Rules of Civil Procedure, so that Rule 4 of the Federal Rules of Appellate Procedure requires that a new notice of appeal be filed after their disposition regardless of the type of prejudgment interest in question. 489 U.S. at 177 n.3. That is the rule that governs this case. TMT's repeated assertion that this is a case about sanctions does not make it so.

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL CONCERNING THE ISSUE PRESENTED BY THE PETITION.

TMT has urged this Court to grant the Petition based on a purported conflict between the circuit courts over the proper treatment of a motion for Rule 11 sanctions. That issue is not before the Court. Petitioner's contention that clarification by the Court is necessary to dispel lower courts' confusion about "litigation sanctions" and Federal

Rule of Civil Procedure 59(e) is unsupported by the cases. Whatever uncertainty there may have been was eliminated by recent decisions of the Court, primarily *Osterneck* and *Budinich v. Becton Dickson & Co.*, 486 U.S. 196 (1988).

In *Osterneck*, the Court cited its opinion in *Budinich* for the principle that the Court was establishing a "practical approach" that did not depend on the characterization of the particular motion in question as involving collateral or non-collateral prejudgment interest. *See* 486 U.S. at 202. When *Budinich* and *Osterneck* are read together, the Rule is clear: Motions for attorney's fees are not motions under Rule 59 and motions for prejudgment interest are Rule 59 motions, regardless of their characterization as "merits" or "nonmerits". The reasoning is this:

> [A]s we said last Term in *Budinich*, "what is of importance here is not preservation of conceptual consistency in the status of a particular [type of motion] as 'merits' or 'non-merits,' but rather preservation of operational consistency and predictability in the overall application of the [finality requirement] of § 1291." "Courts and litigants are best served by the bright-line rule, which accords with traditional understanding," that a motion for prejudgment interest implicates the merits of the District Court's judgment.

489 U.S. at 177 n.3 (citation omitted).

To read *Osterneck* as Petitioner suggests would destroy the certainty created by *Osterneck* and *Budinich*. The standard proposed by Petitioner would require courts to examine the legislative history, the purpose, and the jurisprudential rationale behind the prejudgment

interest in question, each time the issue arose. Such a result would mean that the Court wasted its time in considering and writing *Osterneck*.[2]

Osterneck has achieved the Court's policy of certainty. It has been cited often and followed consistently by the courts of appeals confronted with the issue in this case. *E.g., Dunn v. Truck World, Inc.*, 929 F.2d at 311, 312-13 (7th Cir. 1991); *Lawson v. Gelman Sciences, Inc.*, No. 90-3376 (6th Cir. Feb. 1, 1991); *Keith v. Truck Stops Corp. of America*, 909 F.2d 743, 746 (3d Cir. 1990) (dealing with prejudgment

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[2] There are dozens of state and federal statutes that provide for prejudgment interest for a variety of reasons, including compensation, encouraging settlements, relieving court congestion, and delay damages assessed against unsuccessful defendants. There are also uncodified common law and equitable bases for awards of prejudgment interest. There are at least an equal number of cases interpreting these statutory and uncodified common law and equitable bases for awards of prejudgment interest. *See* Comment, *Prejudgment Interest: Survey and Suggestion*, 77 Northwestern L. Rev. 192 (1982). *See also* the following annotations that discuss prejudgment interest: Annot., *Admiralty – Prejudgment Interest*, 34 A.L.R. Fed. 126 (1977); Annot., *Allowance of Prejudgment Interest on Builder's Recovery in Action for Breach of Construction Contract*, 60 A.L.R. 3d 487 (1974); Annot., *Recovery of Prejudgment Interest on Wrongful Death Damages*, 96 A.L.R. 2d 1104 (1964); Annot., *Application of 28 U.S.C. § 2516(a) to Government Contractor's Claim for Interest Expense for Loss of Use of its Capital Caused by Delay Attributable to Government*, 59 A.L.R. Fed. 905 (1982); Annot., *Automobile Insurer's Liability for Statutory Excess Interest for Delayed Payment of No-Fault Claim*, 14 A.L.R. 4th 761 (1982); Annot., *Insured's Right to Recover from Insurer Prejudgment Interest on Amount of Fire Loss*, 5 A.L.R. 4th 126 (1981); Annot., *Award of Prejudgment Interest Under Miller Act* (40 USCS §§ 270a et seq.), 66 A.L.R. Fed. 901 (1984).

interest mandatory under state law as compensation for delay, but suspendable if delay caused by plaintiff); *Rosen v. Rucker*, 905 F.2d 702, 705 (3d Cir. 1990); *Jurgens v. McKasy*, 905 F.2d 382, 385 (Fed. Cir. 1990) (prejudgment interest awarded in case brought under Lanham Act); *Adams-Arapahoe School District No. 28-J v. Continental Insurance Co.*, 891 F.2d 772, 780 (10th Cir. 1989). In *Rosen*, the Third Circuit held that a motion for litigation delay damages *was* analogous to prejudgment interest, and therefore subject to the *Osterneck* rule, on the following ground: "Treating a motion [for litigation delay damages] as a Rule 59(e) motion maintains relatively simple and comprehensible rules of procedure." 905 F.2d at 706. As explained by Judge Easterbrook, in discussing the cumulative effect of *Osterneck* and *Budinich*:

> The whole point of the [Budinich] case was to end case-by-case inquiries into the relation between the merits and the fee award. The Supreme Court chose a rule to enable both the parties and the court of appeals to know with certainty when the time for appeal begins and ends. . . .
>
> . . . .
>
> *Budinich*, in common with cases such as *Osterneck v. Ernst & Whinney*, emphasizes the need for simplicity and clarity in jurisdictional matters.

Dunn v. Truck World, Inc., 929 F.2d at 312-13 (7th Cir. 1991) (citation omitted).

The "state of confusion" expressed by TMT (Pet. at 10) is not shared by the courts. The only parties who are confused are those who are unaware of the simple bright-line rule of *Osterneck*. It is not the purpose of a writ of certiorari to correct mistakes of law.

Finally, the authority upon which Petitioner relies is inapposite. Petitioner cites a number a cases (Pet. at 10-11) illustrating that some courts of appeals consider motions for prejudgment interest to be motions to alter or amend the judgment within the meaning of Federal Rule of Civil Procedure 59(e), while others hold that motions for sanctions under Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927 are not Rule 59(e) motions. This is more than a mere *non sequitur*. Of the nine cases Petitioner cites as "[e]vidence of confusion about the relationship between sanctions motions and Rule 59(e)" (Pet. at 11), *eight* were decided before *Osterneck*, and thus show very little about lower courts' appreciation of that case and the need for a new pronouncement from this Court.[3] None purport to involve motions for prejudgment interest, and some seem irrelevant even to Petitioner's strained argument. *Kurkowski* and *Wojan*, for example, say no more than that a district court has jurisdiction to amend a judgment to impose sanctions sought by motion filed within 10 days of judgment of dismissal. 815 F.2d at 972, 819 F.2d at 203. This is unobjectionable, and Petitioner cannot seriously contend otherwise.

The ninth case, *Fisher v. Klein*, 873 F.2d 626 (2d Cir. 1989), is the only one referred to by Petitioner in which

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[3] *Lupo v. R. Rowland & Co.*, 857 F.2d 482 (8th Cir. 1988); *Beeman v. Fiester*, 852 F.2d 206 (7th Cir. 1988); *Wojan v. General Motors Corp.*, 851 F.2d 969 (7th Cir. 1988); *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988); *Kurkowski v. Volcker*, 819 F.2d 201 (8th Cir. 1987); *Hicks v. Southern Maryland Health Systems Agency*, 805 F.2d 1165 (4th Cir. 1986); *Jackson Marine Corp. v. Harvey Barge Repair, Inc.*, 794 F.2d 989 (5th Cir. 1986); *Gordon v. Heimann*, 715 F.2d 531 (11th Cir. 1983).

Osterneck was actually relied upon by the court of appeals. In *Klein*, the Second Circuit did indeed find that a motion requesting that a judgment be amended under Federal Rule of Civil Procedure 59(e) to include an "award of sanctions" nullified a notice of appeal filed before the motion was resolved. 873 F.2d at 627. Assuming that the Court of Appeals used "sanctions" in its usual sense, the case may well have been incorrectly decided. But what has that to do with this case? A decision finding that a post-trial motion for sanctions of an unspecified nature was a Rule 59(e) motion hardly conflicts with a case holding a motion for prejudgment interest to be a Rule 59(e) motion. Indeed, there would be no conflict even if this case concerned a motion for sanctions, for then the only two post-*Osterneck* cases raised by Petitioner would be in agreement. But this is not a case about sanctions.

II. A MOTION FOR CLAYTON ACT PREJUDGMENT INTEREST IS A MOTION FOR PREJUDGMENT INTEREST AND NOT SANCTIONS FOR ATTORNEY MISCONDUCT.

Even assuming that an inquiry into the nature of Clayton Act prejudgment interest were relevant, it is not at all clear from the legislative history that such interest is intended as a penalty and it is certainly not a sanction for attorney misconduct in the same sense as sanctions under Rule 11 or 28 U.S.C. § 1927. It was, like almost all prejudgment interest, partly based on the rationale that an antitrust plaintiff "cannot really be made whole unless fully compensated by the payment of prejudgment

interest."[4] In response to questions concerning the proposed addition of prejudgment interest to Section 4 of the Clayton Act, John Shenefield, former Assistant Attorney General for the Antitrust Division, stated that it had two purposes:

> [t]o remove the incentive for delay [and] to provide the appropriate compensation and interest thereon to the plaintiff in pursuit of an award of damages.[5]

The legislative history shows that at the time it authorized prejudgment interest under the Clayton Act, Congress specifically considered – and rejected – a provision that would have imposed sanctions for *attorney* misconduct. Congress instead amended 28 U.S.C. § 1927 to impose such sanctions against attorneys guilty of dilatory tactics.[6] Thus, those who drafted the statutes intended an award of prejudgment interest under the Clayton Act to be an entirely separate matter from sanctions that can be imposed under, *e.g.*, 28 U.S.C. § 1927. Petitioner's repeated attempts to equate litigation sanctions and prejudgment interest (Pet. at 10, 19) are contradicted by the congressional history.

A further review of this legislative history reveals various motives behind the 1980 amendment and the fact

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[4] H.R. Rep. No. 875, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2766, 2767.

[5] H.R. Rep. 875, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2766, 2769.

[6] H.R. Conf. Rep. No. 1234, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2781, 2782.

that the final version of amended Section 4 was not the same as that which was originally proposed. That confusion supports the point made by this Court in *Budinich* and *Osterneck*: Litigants and courts should be able to tell from the plain words of statutes and jurisprudence when their judgments are final, and they should not be required to engage in an exegesis of the purpose and history of the prejudgment interest in question. Section 4 of the Clayton Act allows motions for "prejudgment interest" and not sanctions; *Osterneck* said all motions for prejudgment interest are motions under Rule 59(e); and Zapata filed a motion for prejudgment interest. The result reached by the Fifth Circuit in this case flows naturally from these facts.

The general purpose of Clayton Act prejudgment interest is the same as any discretionary prejudgment interest. "The purpose of allowing such [prejudgment] interest is to promote expeditious settlements of claims, and to discourage defendants from deferring payments of awards or settlements to injured plaintiffs." 47 C.J.S. *Interest and Usury* § 49 (1982). Interest for money in general, and on judgments in specific, is always measured by the amount owed. "Interest is the compensation allowed by law . . . for the . . . detention of money." BLACK'S LAW DICTIONARY 729 (5th ed. 1979). In that sense, prejudgment interest is always directly related to the merits and not collateral. In the sense that it is always a mere mechanical function of a rate and a principal amount, it is seldom, if ever, directly related to the facts of the case. It is just this sort of inquiry which *Osterneck* and *Budinich* sought to avoid and rendered irrelevant.

In support of its contention that this case is primarily about Rule 11 sanctions for attorney misconduct, Petitioner makes several other arguments concerning the purported similarity between sanctions available for attorney misconduct under Rule 11 and 28 U.S.C. § 1927 on the one hand and prejudgment interest under 15 U.S.C. § 15 on the other. Again, the whole purpose of *Osterneck* was to obviate the need to examine such merits or nonmerits issues. Nevertheless, even these arguments are hollow. Specifically:

- TMT points out that prejudgment interest is one of the possible sanctions available under Rule 11. Rule 11 and Rule 37 also allow a court to default an intransigent defendant. That is certainly not "collateral" to the merits.

- TMT argues that "§ 4(a) of the Clayton Act actually incorporates the standards of Rule 11" and "closely tracks the standards set forth in Rule 11" (Pet. at 19). That is impossible. Rule 11 was amended to its present form in 1983; Section 4 of the Clayton Act was amended to its present form in 1980. All Section 4(a)(2) of the amended Clayton Act does is allow a trial court to consider sanctionable attorney misconduct as one factor in its decision whether to award prejudgment interest as part of a plaintiff's compensation for the delay in achieving its award.

- TMT argues that Clayton Act prejudgment interest is unrelated to the "merits" of the underlying litigation. An examination of Zapata's motion for prejudgment interest (Pet. App. F) and the district court's opinion (Pet. App. J) reveals that the almost exclusive concern of both was the relationship of Petitioner's motion practice to the merits of the

case. Under 15 U.S.C. § 15(a), the district court had to consider the extent to which TMT's motions were "lacking in merit" to reach its conclusion that several of TMT's tactics were frivolous, but not in bad faith (Pet. App. J, at 63a).

- TMT argues that Clayton Act prejudgment interest is purely penal. An award of prejudgment interest would have added approximately $4 million to Zapata's award for TMT's destruction of a business in 1984. That certainly would have helped to make Zapata "whole" for the profits and investments it had lost six years previously. To Respondent, then, an award of prejudgment interest would have been compensatory and not penal.

TMT's argument that prejudgment interest is "collateral" to the main award and therefore a sanction is sophistry. Section 4 of the Clayton Act creates the private cause of action for antitrust victims, authorizes trebled damages and allows for a discretionary award of prejudgment interest. Prejudgment interest is only available after judgment for a plaintiff is entered, and, unlike attorney's fees and costs, it is a direct function of the amount of the untrebled judgment. It can only be assessed against the defendant and not against an attorney. Rule 11, Rule 37, and § 1927 sanctions are primarily, if not entirely, directed at counsel misconduct; they can be assessed at any point in the litigation process; they are customarily assessed in amounts related only to the immediate harm done by counsel misconduct; and they can be awarded regardless of the outcome of the litigation. Again, however, in the face of *Osterneck's* clear rule, all of these arguments are

academic. A motion for prejudgment interest, discretionary or mandatory, and regardless of its relationship to the "merits", is a motion to alter or amend a judgment under Rule 59(e), which stays finality under Rule 4(a)(4) until disposed of.

III. THIS IS NOT AN APPROPRIATE CASE FOR REVIEW

Finally, Petitioner argues that this case would be ideal for the court's consideration of the proper treatment of motions for sanctions under the Clayton Act and "all other sources of sanctions for litigation misbehavior" because subsection (2) of 15 U.S.C. § 15(a) allows the trial court to consider whether a party or its representative violated *any* "applicable rule, statute, or court order providing for sanctions. . . . " (Pet. at 9). This, Petitioner argues, means that 15 U.S.C. § 15(a)(2) *"subsumes all sources of authority* for litigation sanctions. . . . " (Pet. at 12) [emphasis added]. That is not a logical deduction. Furthermore, an examination of Respondent's motion for prejudgment interest (Pet. App. F, at 39a *et seq.*) reveals that it sought relief *only* under subsections (1) and (3) of 15 U.S.C. § 15(a), and not under subsection (2). Specifically, Zapata did not argue that Petitioner or its counsel had violated any statutes, rules or orders providing for sanctions. That was not an issue below. Rather, Zapata argued that prejudgment interest was due under subsection (1) for TMT's frivolous motion practice and under subsection (3) for its overt efforts to delay the litigation. Thus, Petitioner asks the Court to resolve an issue which was neither raised below nor factually developed. The request should be denied. Such a finding is not likely to

be of help to litigants and is very likely to return the courts below to the uncertainty as to finality which existed prior to *Budinich* and *Osterneck*.

CONCLUSION

If the Court is going to decide how litigants and Courts should treat post-judgment motions for sanctions, it should take a case presenting such an issue. This case does not involve a motion for sanctions. It involves an issue decided unanimously by the Court in 1989. To take the case in order to affirm the decision of the Fifth Circuit would be pointless. To take the case in order to reverse it would return the circuit courts to the case-by-case exercise and the inconsistency that existed prior to *Osterneck*. The Petition should be denied.

Respectfully submitted,

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